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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No.

HERBERT HARVEY,
Petitioner,

vs.

JOHN LAWRENCE LYONS, ET ALS.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY, AND APPENDIX

HERBERT HARVEY, PRO SE,
Petitioner,

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APPENDIX.

*Bron vs. Weintraub**

IN TRIAL COURT
Superior Court
Docket No. C 754-60

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No.

HERBERT HARVEY,
Petitioner,

vs.

JOHN LAWRENCE LYONS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Petitioner prays that a writ of certiorari issue to review the per curiam opinion and mandate of affirmance of Supreme Court of New Jersey issued and filed June 1, 1965 in the matter of *Bron et al.* vs. *Weintraub et al.* in Superior Court of New Jersey, Docket No. C-754-60.

Petitioner is Herbert Harvey. Respondents are John Lawrence Lyons and Margaret F. Lyons, his wife; John A. Vaticano and Alice J. Vaticano, his wife; John Clarence Keitel and Jean A. Keitel, his wife; Richard J. Reach and Viola H. Reach, his wife; Angelo A. Cifrodella and Gloria C. Cifrodella, his wife; John Tyborowski and Stasia M. Tyborowski, his wife. Respondents are plaintiffs in the said action. Petitioner is a defendant.

CITATIONS TO OPINIONS BELOW.

The per curiam opinion, and the mandate accompanying it, of which review is sought, are part of the certified record filed with this petition. (Supreme Court of New Jersey Docket No. 4654.) Also in the certified record are the Amended Final Judgment of Superior Court of New Jersey entered June 26, 1964 which the per curiam opinion affirms (Superior Court Appellate Div. Docket No. A-1172-63, Appendix of Defendants-Appellants page 70a), and an earlier Opinion of Supreme Court of New Jersey reversing an earlier judgment of Superior Court in the same matter (ibid, page 10a). The above are also printed in the Appendix, *infra*, as follows:

	Date Entered and Filed	*Appendix Page*
Per curiam opinion and mandate of Supreme Court of New Jersey (of which review is sought)	June 1, 1965	47a
Amended Final Judgment of Superior Court of New Jersey affirmed by the above per curiam opinion and mandate	June 26, 1964	37a
Opinion and mandate of Supreme Court of New Jersey reversing an earlier Judgment of Superior Court in the same matter	April 20, 1964	23a

JURISDICTION.

Review is sought of the per curiam opinion and mandate of affirmance entered and filed in Supreme Court of New Jersey June 1, 1965. Jurisdiction of this court is conferred by 28 U.S.C. sec. 1257.

> Final judgments or decrees rendered by the highest court of a state in which a decision may be had may be reviewed by the Supreme Court . . . (3) By writ of certiorari, where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

Petitioner claims under the 14th amendment.

THE QUESTION PRESENTED.

Where a person is the owner of several parcels of real property which are the subject of the same or consolidated state court litigation and the highest state court enunciates therein a novel, general and wide-sweeping public policy basis, operative upon a particular combination of facts, for divestiture of the owner's title, are the requirements of due process satisfied by the highest state court's subsequent affirmation of a judgment of divestiture entered in the judicial cause where there has been no trial of the operative facts and no judicial determination of their existence.

STATEMENT.

Harry Weintraub died intestate in 1933 seized of certain lands. In 1935, they were sold at a tax sale, subject to redemption, to the Township. In 1952, the Township, apparently supposing itself to be the owner, sold the land involved in the instant action to a builder, who erected seven houses thereon and sold six of them under V. A. mortgages to respondents and the seventh to Wansel. Wansel conveyed to Bron who discovered the want of title. In 1959, Wansel and the Township instituted a tax foreclosure action as a way of getting title into Bron. During the pendency of that action, Hudson Trading Corporation, a real estate speculator, purchased the title of all seven from the Weintraub heirs. Harvey, the present petitioner, a mortgagee of Hudson, together with Hudson, brought an action (*Harvey et al.* vs. *Twp. of Woodbridge et al.*) for

redemption of the tax sale certificate. In this action Hudson* was determined to be the owner; the tax sale certificate was ordered discharged. Thereupon all seven occupants commenced the present action (Bron vs. Weintraub) against Hudson to quiet their "title". In this action, Hudson also prevailed in Superior Court. Appellate Division unanimously affirmed. On certification the matter was heard by the Supreme Court of New Jersey, and judgment was reversed. There was no dispute that Hudson was the legal owner under its deeds from the Weintraub heirs. Reversal was on grounds of public policy. A constructive trust was found. The facts on which public policy was invoked were stated in the Opinion. They are not earlier in the record. The matter was remanded to the trial court for entry of judgments in accordance with the Opinion.**

Back in trial court, Hudson objected to entry of judgment against all of the properties, arguing that against some of them the Opinion might not apply. There had been no trial of the facts set forth in the Opinion.

The trial court nevertheless entered an Amended Final Judgment alienating all of the properties.

This raised a constitutional question. The trial court's amended final judgment divested Hudson and petitioner of their interest in the subject properties under the terms of a mandate from above which set forth the facts upon which divestment, under public policy, was to be made, and directed the court below to proceed in accordance with its practice and rules, but furnished no record or evidence concerning the facts surrounding the several properties.

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* Hudson conveyed an interest to Frank Altomare, another defendant. Reference herein to "Hudson" will include both.

** A companion action, *Hudson Trading Corporation et al.* vs. *Saulnier et al.*, affecting three other properties formerly of Harry Weintraub, was tried together with *Bron* vs. *Weintraub*, the instant action, under an order of consolidatoin in trial court. These two cases remained together in all proceedings in the state courts. Thus, for example, the Opinion cited in the text refers to ten properties, being the seven of *Bron* vs. *Weintraub* and the three of *Hudson* vs. *Saulnier*. Harvey was not a party to *Hudson* vs. *Saulnier*, and the present petition excludes it and the three properties it concerned. The present petition concerns six of the seven properties of *Bron* vs. *Weintraub*, the excluded one being Bron's.

The trial court held no hearing and took no testimony on the facts. Petitioner claimed this was taking without process. It was appealed on this ground to the Appellate Division of Superior Court.* The case was lifted to Supreme Court of New Jersey by certification at the latter court's instance.** In this appeal, the constitutional question here raised was presented. (Appendix, page 45a.) It was ignored by the Supreme Court, which did not rule on it. It merely affirmed the trial court. The Supreme Court is the court of last resort in New Jersey. We thus reach the jurisdiction of this court on the question.

The review sought here is of the affirmance, filed June 1, 1965, by Supreme Court of New Jersey of the amended final judgment of Superior Court entered June 26, 1964.†.

FEDERAL QUESTION RAISED BELOW.

The federal question here raised was first raised on appeal of the Amended Final Judgment of Superior Court (affirmance of which is here sought to be reviewed) to the Appellate Division of the Superior Court. Notice of appeal was filed August 10, 1964. (See Appendix, page 43a.) That appeal was thereafter transferred, on the initiative of the Supreme Court of New Jersey, to the latter court.

The question was not raised earlier in the matter because it did not arise earlier. The Supreme Court's mandate of April 20, 1964, pursuant to which Superior Court proceeded on June 26, 1964, directed Superior Court to proceed "in accordance with the rules and practice relating to that court." The rules and practice of that court called for proof. The federal question of due process arose at the moment that Superior Court entered judgment without a judicial determination of fact, being the Amended Final Judgment entered June 26, 1964.

* Notice of appeal, Appendix, page 43a.

** Certification, Appendix, page 46a.

† The original defendants in the action were Hudson Trading Corporation, Frank Altomare et ux and Herbert Harvey. Defendants Hudson Trading Corporation and the Altomare's assigned the action, including the counter-claim, to defendant Herbert Harvey.

ARGUMENT.

There has been no judicial determination of the facts upon which divestiture of the owner was based.

The record, as to facts, consists of the complaint (*Bron et al.* vs. *Weintraub et al.*, Appendix, page 1a et seq.), an answer and counterclaim by Hudson Trading Corporation and Frank Altomare (herein jointly called Hudson) and an answer by Herbert Harvey, the petitioner. There is also an answer to Hudson's counterclaim. None of these pleadings is verified. Hudson sets up deeds from the heirs of Harry Weintraub; Bron et al. set up other deeds.

The action is in the form of a quiet title action, as provided by N. J. S. A. 2A:62–1. Judgment finds legal title in Hudson by its deeds from the Weintraub heirs.

Another fact may be culled from the final judgment in the action in which petitioner effectuated his redemption *Harvey et al.* vs. *Woodbridge et al.*, (Appendix, page 49a.) It describes the lands as

> Lots Numbered 13/18 both inclusive and Lots Numbered 24/30 both inclusive in Block Numbered 486 I, owned by Hudson Trading Corporation and Frank Altomare, successors in title to Harry Weintraub, deceased

These are the facts and determinations in the record‡ which the trial court sent to the Supreme Court on the first appeal. This was the appeal in which the Opinion of reversal issued.

The Opinion† begins with the foregoing facts. We read (Appendix, p. 24a):

‡ There was no testimony except a letter read into the record by counsel. It is mentioned in the Opinion, where it is dismissed as not a ground of divestiture (Appendix, page 26a).

† Reference herein to the "Opinion" is to the Opinion of the Supreme Court of New Jersey of April 20, 1964 reversing the original (1962) final judgment of Superior Court in favor of Hudson et al. That opinion was on appeal by Bron et al., being the first appeal. It is distinguished from the per curiam opinion (and mandate) of the Supreme Court of New Jersey of June 1, 1965, affirming the Amended Final Judgment of Superior Court, herein called the "affirmance." The affirmance was in the appeal by Hudson et al. from the Amended Final Judgment, being the second appeal.

Hudson Trading Corporation and Frank Altomare redeemed* on the basis of deeds obtained from the Weintraub heirs (the deeds ran to Hudson which in turn conveyed a quarter interest to Altomare.) The present action ensued, the householders seeking to quiet title and Hudson and Altomare demanding possession and mesne profits.

The Opinion now went on to say that "with respect to the factual pattern before us" public policy demanded relief for the occupants of the houses and that the holders of the legal title (Hudson and Altomare) be divested upon reimbursement of what they paid. The factual pattern in question is set out in the Opinion substantially as follows:

(a) A tax title to the properties was under foreclosure at the time Hudson acquired the title of Weintraub.

(b) A notice to absent defendants was published in the foreclosure action as part of the required procedure.

(c) Hudson read the notice of foreclosure.

(d) Hudson's consequent conduct burdened the occupants of the houses with manifest hurts.

(e) Hudson paid $400. for the properties.

In a tone of moral repugnance, the court argued that these facts warrant the imposition of a constructive trust on the properties in the hands of Hudson and Altomare in favor of the "householders." It directed judgments in harmony. It did not specify the householders.†

This extraordinary divestiture was not reviewed. Petitioner is bound by it. However, it is elementary that such an extra-legal invasion of property rights must be limited, as its terms are, to the "factual pattern" on which it is

* Tax sales in New Jersey are redeemable until the right to redeem has been cut off in the manner prescribed by statute. N.J.S.A. 54:5-54.

† Altogether, including the Wansels, there were eleven couples of householders for the ten houses. Six of the couples are respondents.

based. It would be frivolous, capricious and a mockery of due process if a court were permitted to divest indiscriminately merely because such an opinion had been written, without determining what factual situation exists in the several cases. The concept of property itself would come into question. In particular, public policy, under the decisions, regularly runs to protect property, rather than the reverse. *Safeway Stores Inc.* v. *Retail Clerks International Assn.* (California Supreme Court 1953) 41 Cal 2nd 567, 575, 261 Pac 2nd 721, 726.

In this situation, as in general, the burden of proof is on plaintiffs who seek to divest. As to the degree of proof (*Streeter* v. *Gamble,* Illinois Supreme Court 1921, 23 A.L.R. 1485, headnote 1),

> 1. To establish a constructive trust ex maleficio the evidence must be clear, strong, unequivocal and unmistakable, and lead to but one conclusion.*

---

* In the later *Lefkowitz* v. *Silver* (North Carolina Supreme Court 1921) 182 N C 339, we read: "Whether we should hold this to be a parol trust, or a trust ex maleficio (that is, one growing out of fraud, misdoing or tort) . . . the rule of evidence and intensity of proof is the same . . . The latter kind of trust [trust ex maleficio] is also known as a constructive trust . . . It is entirely in invitum and is forced upon the conscience of the malefactor, who will be declared a trustee because of his wrong or fraud, for the purpose of working out right and justice . . .

Whether a parol, express, resulting or constructive trust, it is established by the same kind of evidence . . . If he had merely asked that the deed be set aside for fraud . . . the evidence of plaintiff would be required to preponderate only . . . 39 Cyc. at pp 84, 85 thus summarizes the doctrine here and elsewhere: 'A higher degree of proof that mere preponderance of evidence is required . . . where it is sought to convert into a trustee a person holding legal title to property.'"

The annotation of this case at 23 A.L.R. 1500 contains a cyclopedic summary of cases prescribing the kind of evidence required to establish parol trusts, and the above language prescribes the same criteria for trusts ex maleficio.

See also *Vansciver* v. *Bryan* (Chancery of N. J. 1861) 13 N. J. Eq. 434, 436 "The rule is well established that the court cannot notice matter, however clearly proved, of which there is no allegation in the pleadings . . . [p 437] But aside from this technical difficulty, his equitable title is not satisfactorily proved . . . A party who comes into court seeking relief on equitable grounds against the legal rights of another should establish his equity by clear and irrefragible proof." The rule is enlarged in *Humphreys* v. *Eastlack* (Chancery of N. J. 1902) 63 N. J. Eq. 136, 146; facts invoked in support of pleaded claims may not subsequently be strung together to construct a claim not in the pleadings.

In *Bron* v. *Weintraub,* the pre-trial order designated the legal issues as "7. Legal title to the premises, estoppel, laches, adverse possession, res adjudicata, right to mesne profits." There is no mention of constructive trust.

Mere conjecture does not warrant a judgment. *Grell* v. *Kelly*, 134 N. J. Eq. 593, 601 (Prerogative Court 1944).

> Proof of a fact inheres in the probative effect of competent and relevant evidence, and however common may be the indulgence of surmise and conjecture, judicial tribunals still exact proof.

The law of evidence in New Jersey is clear.

> "Burden of proof" means the obligation of a party to meet the requirements of a rule of law that the fact be proved either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt as the case may be. N.J.S.A. 2A:84A–5.

At the time the Opinion, with its new and revolutionary application of public policy, was delivered, defendants (petitioner and Hudson) had no way of knowing to which of the several properties—they had different title histories—the Opinion might apply. The factual pattern invoked by the Opinion was outside the then record and much of it was outside defendants' knowledge. It was, of course, the trial court's province to try the facts. Instead, it divested all the properties without hearing any facts. In the subsequent appeal on the constitutional question thus raised, one of the properties (Bron's) was omitted. This was because an examination into the circumstances, made in the interim, convinced counsel that, if the facts were tried, a substantial segment of the posited factual pattern would apply to the Bron* property. Presumably counsel found no such applicability to the other properties.

Petitioner believes, and so represents to the court, that on a trial of the facts on evidence pursuant to legal process and procedure, the factual pattern posited in the Opinion of the Supreme Court of New Jersey will prove to be sub-

* To whom petitioner makes due apologies for the imposition inflicted by Hudson. It must be remembered, in extenuation, that the doctrines of the Opinion were not in existence at the time Hudson acquired title to what is now Bron's property. Indeed, Hudson had at the time no immediate way of knowing that Bron existed.

stantially inapplicable to the six properties claimed by respondents.

With respect to that factual pattern, the burden of proof is on respondents (the plaintiffs excluding Bron), who seek to overturn the legal title. The burden, on whomsoever it lies, would be met at a hearing on the facts, by presentation of proof of that degree of preponderance required by the rule of evidence. No such hearing was had. For judgment to issue, as it did, and over objection of counsel, was error and outside due process. Affirmance of it by the Supreme Court of the state on an appeal for due process was a graver error.

The affirmance (the per curiam opinion which denied the second appeal) said merely that the amended final judgment was being affirmed as "complying with the mandate" (i.e., with the Opinion in the first appeal). Whatever aspect of the mandate, or of the Opinion, it may have complied with, it did not comply with due process.*

Does this case warrant review? The doctrine we attack is that state courts can divest property by caprice. If the determination stands for which review is sought, no evidence need ever be produced to divest a property owner—only a pronouncement by a court, which may borrow or invent facts as it chooses. We are describing a jurisprudence of feudalism; it antedates the Magna Carta.

The mischief is patent. Litigation has already been commenced in New Jersey looking to application of the doctrine to divest others, under circumstances, of course, somewhat different. Litigants are proposing to remedy "hurts" which are imaginary. The precedent invites courts in the state to determine the ownership of property on wholly subjective criteria. No proof is necessary. An

* The mandate of reversal read: ". . . proceedings be remitted to the said Superior Court, Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court." (Appendix, page 33a.)

unpaid tax is enough to divest the owner, if a court feels someone might be "hurt."

The mischief does not end here. A statute was passed (N. J. S. A. 54:5–104.100ff) shortly following judgment in *Bron* vs. *Weintraub,* of which the operative language reads:

> Where premises are owned, or thought to be owned, by an individual . . . occupying, or intending to occupy the same himself as a single family residence . . . any claim of title, lien, encumbrance, restriction or limitation . . . shall be conveyed by the owner of such claim to said individual . . . upon payment to said owner . . . of the amount paid by the owner to acquire said interest.

The statute goes on to limit its application to situations in which the individual "thinks he owns" under a tax sale.

This heady statute, which gives to individuals rights similar and in some respects superior to the right of condemnation now limited to the sovereign, will, it is generally believed, be upheld in New Jersey. Designed on its face (as was Bron) to help "individuals," it is actually a device to protect influential title companies against having to pay out on defective tax titles.* It does so by divesting owners in a manner which cannot, except for the precedent-forming implications of Bron, be construed as constitutional. The statute, to be sure, follows the Opinion in Bron rather than the affirmance which we here seek to review. The affirmance, however, goes beyond the Opinion.

Thus Bron has already given birth to litigation and legislation of dubious constitutionality, with a proposed no-evidence rule of no constitutionality at all as midwife. This is a preview of what the future holds—more of the same ramifying in various directions. All these fruits will eventually have to be dumped in the lap of the Supreme Court of the United States. We seek here to review of the rule of

* A monthly publication of the New Jersey Realty Group ("Title Service Exclusively") under the imprimatur of the New Jersey Realty Title Insurance Company, in its November 1964 issue, gloats openly over the legal position created by Bron and suggests various methods of widening its scope.

no evidence. Can a state court divest on public policy, where the facts warrant such extraordinary invasion of the right of property? I think it can. Can that same court divest capriciously, without any of the facts before it which warrant the divestment? I argue it cannot. To determine this question here will avoid multiplying the issue into frightful dimensions before making the determination, which in the end will have to be made, and in this court.

For these reasons, petitioner respectfully urges certiorari should be granted.

HERBERT HARVEY,
pro se.

APPENDIX

Complaint (Re: *Theodorus Bron, et al. v. Harry Weintraub, et al.*, Docket No. C-754-60)

(*Filed November* 22, 1960.)

The plaintiffs, residing in Woodbridge Township, Iselin, Middlesex County, New Jersey, say that:

FIRST COUNT

1. On March 8, 1959, Victor Wansel and Helen Wansel, his wife, conveyed to the plaintiffs, Theodorus Bron and Heiltje A. Bron, his wife, the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 10 feet of Lot 24, all of Lots 25 and 26, and the westerly 5 feet of Lot 27, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925, and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The deed of conveyance was recorded in the County Clerk's Office of Middlesex County on August 24, 1959, in Deed Book 2116 at page 368.

3. The plaintiffs named in this count have been and are in peaceable possession of said lands ever since the recording of said deed and therefore have always claimed to own the same.

4. The title of the plaintiffs named in this count to said lands, or some part thereof, is denied or disputed by the defendants, mentioned and described in the caption of this complaint, each of whom claim or are reputed to own the same, or some part thereof, or some interest therein or hold some lien or encumbrance thereon.

Complaint (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

5. No action is pending to enforce or attest the validity of the defendants' title, interests, liens or encumbrances thereon.

6. Plaintiffs named in this count call upon defendants to set forth and specify their title, interest, claim, lien or encumbrance on the premises herein described and how and by what instruments the title, interest claim, lien or encumbrance is derived or created.

WHEREFORE, the plaintiffs named in this count demand judgment:

A. That the defendants and each of them have no title to nor interest nor encumbrance upon such lands.

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

SECOND COUNT

1. By deed of conveyance recorded in the County Clerk's Office of Middlesex County in Deed Book 1669 at page 597, title was conveyed to the plaintiffs, John Tyborowski and Stasia M. Tyborowski, his wife, of the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as Lots 13, 14 and the westerly 15 feet of Lot 15, in Block 486-I, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The plaintiffs named in this count plead all of the allegations contained in paragraphs 3 to 6 inclusive of the

Complaint (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

First Count of the Complaint, with reference to their own title as set forth in this count, and the same allegations are hereby incorporated and referred to in this count and made a part hereof as though the same were again fully set forth.

WHEREFORE, the plaintiffs named in this count demand judgment:

A. That defendants and each of them have no title or interest nor encumbrance upon such lands.

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

THIRD COUNT

1. By deed of conveyance recorded in the County Clerk's Office of Middlesex County in Deed Book 1673 at page 597, title was conveyed to the plaintiffs, Angelo A. Cifrodella and Gloria C. Cifrodella, his wife, of the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 5 feet of Lot 15, all of Lots 16 and 17, and the westerly 15 feet of Lot 18, in Block 486-I, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The plaintiffs named in this count plead all of the allegations contained in paragraphs 3 to 6 inclusive of the First Count of the Complaint, with reference to their own title as set forth in this count and the same allegations are hereby incorporated and referred to in this count and made a part hereof as though the same were again fully set forth.

Complaint (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

WHEREFORE, the plaintiffs named in this court demand judgment:

A. That the defendant and each of them have no title or interest nor encumbrance upon such lands.

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

FOURTH COUNT

1. By deed of conveyance recorded in the County Clerk's Office of Middlesex County in Deed Book 1669 at page 435, title was conveyed to the plaintiffs, Richard J. Reach and Viola H. Reach, his wife, of the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 5 feet of Lot 18, all of Lots 19 and 20 and the westerly 10 feet of Lot 21, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The plaintiffs named in this count plead all of the allegations contained in paragraphs 3 to 6 inclusive of the First Count of the Complaint, with reference to their own title as set forth in this count, and the same allegations are hereby incorporated and referred to in this count and made a part hereof as though the same were again fully set forth.

WHEREFORE, the plaintiffs named in this count demand judgment:

A. That the defendants and each of them have no title or interest nor encumbrance upon such lands.

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

FIFTH COUNT

1. By deed of conveyance recorded in the County Clerk's Office of Middlesex County in Deed Book 1669 at page 444, title was conveyed to the plaintiffs, John Clarence Keitel and Jean A. Keitel, his wife, of the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 10 feet of Lot 21, all of Lots 22 and 23 and the westerly 10 feet of Lot 24, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The plaintiffs named in this count plead all of the allegations contained in paragraphs 3 to 6 inclusive of the First Count of this Complaint, with reference to their own title as set forth in this count, and the same allegations are hereby incorporated and referred to in this count and made a part hereof as though the same were again fully set forth.

WHEREFORE, the plaintiffs named in this count demand judgment:

A. That the defendants and each of them have no title to nor interest nor encumbrance upon such lands.

Complaint (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

SIXTH COUNT

1. By deed of conveyance recorded in the County Clerk's Office of Middlesex County in Deed Book 1670 at page 130, title was conveyed to the plaintiffs, John A. Vaticano and Alice J. Vaticano, his wife, of the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 15 feet of Lot 27, all of Lots 28 and 29 and the westerly 5 feet of Lot 30, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The plaintiffs named in this count plead all of the allegations contained in paragraphs 3 to 6 inclusive of the First Count of this Complaint, with reference to their own title as set forth in this count, and the same allegations are hereby incorporated and referred to in this count and made a part hereof as though the same were again fully set forth.

WHEREFORE, the plaintiffs named in this count demand judgment:

A. That the defendants and each of them have no title to nor interest nor encumbrance upon such lands.

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

Complaint (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

SEVENTH COUNT

1. By deed of conveyance recorded in the County Clerk's Office of Middlesex County in Deed Book 1669 at page 441, title was conveyed to the plaintiffs, John Lawrence Lyons and Margaret F. Lyons, his wife, of the following described lands located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

KNOWN and designated as the easterly 15 feet of Lot 30 and the westerly 40 feet of Lots 31 to 35, both inclusive, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

2. The plaintiffs named in this count plead all of the allegations contained in paragraphs 3 to 6 inclusive of the First Count of this Complaint, with reference to their own title as set forth in this count, and the same allegations are hereby incorporated and referred to in this count and made a part hereof as though the same were again fully set forth.

WHEREFORE, the plaintiffs named in this count demand judgment:

A. That the defendant and each of them have no title to nor interest nor encumbrance upon such lands.

B. That the plaintiffs named in this count have a good and valid title to such lands and premises insofar as the claims of the defendants are concerned.

BOYD, DODD, KEER & BOOTH,
Attorneys for Plaintiffs,
By ERNEST F. KEER, JR.,
a partner.

Answer and Counterclaim of Defendants Hudson Trading Corporation and Altomare (Re: *Theodorus Bron, et al.* v. *Harry Weintraub, et al.*, Docket No. C-754-60)

(*Filed December* 27, 1960.)

Defendants, Hudson Trading Corporation, a corporation of the State of New Jersey, with its principal office at 127 Hudson Street, Hackensack, Bergen County, New Jersey, and Frank Altomare and Amelia Altomare, his wife, residing at 245 Cedar Avenue, Hackensack, Bergen County, New Jersey, say:

Answer to First Count

1. Paragraphs 1 to 3 inclusive are denied.

2. In answer to Paragraph 4 these defendants state that Hudson Trading Corporation and Frank Altomare, defendants, are the lawful owners with a fee title to the lands set forth in the First Count and that Amelia Altomare, defendant, has an inchoate right of dower in her husband's share.

3. In answer to Paragraph 5 these defendants state that although no action was started to enforce or attest the validity of their title, there was an action pending and in preparation by the defendants to enforce and attest to the validity of their title and for mesne profits.

4. In answer to Paragraph 6 defendants, Hudson Trading Corporation and Frank Altomare, set forth their title of the lands set forth in the First Count and how and by what instruments the title is derived or created as follows:

Deed—Danwil Developers, Inc., to El-Ka Holding Co., Inc., dated November 27, 1929 recorded in the Middlesex County Clerk's Office on January 10, 1930 in Book 977 of

Deeds for said county at page 84 conveys numerous lots including Lots Numbered 24, 25 and 26 in Block Numbered 486 I set forth in the First Count.

Deed—Danwil Developers, Inc., to El-Ka Holding Co., Inc., dated November 27, 1929 recorded in the Middlesex County Clerk's Office on January 10, 1930 in Book 977 of Deeds for said county at page 87 conveys numerous lots including Lot Numbered 27 in Block Numbered 486 I set forth in the First Count.

Deed—El-ka Holding Co., Inc. to Harry Weintraub dated July 2, 1931 recorded in the Middlesex County Clerk's Office on July 23, 1931 in Book 1013 of Deeds for said county at page 472 conveys numerous lots including all of the lots set forth in the First Count.

Harry Weintraub aforesaid died intestate and unmarried on March 15, 1933 a resident of Brooklyn, New York City, New York and left him surviving as his only heirs at law 2 sisters namely Bessie Weintraub who later became Bessie Sachs and Rose Weintraub who later became Rose King.

Deed—Bessie Sachs and Harry M. Sachs, her husband, to Hudson Trading Corporation dated November 10, 1959 recorded December 21, 1959 in the Middlesex County Clerk's Office in Book 2145 of Deeds for said county at page 272 conveys an undivided one-half interest in numerous lots including all of the lots set forth in the First Count.

Rose King aforesaid died intestate on the 5th day of June 1959 leaving a Last Will and Testament dated August 30, 1958 which was probated in the Orphans' Court of Prince George's County, Maryland, whereunder William King, her husband, was appointed Executor and Trustee with power of sale.

Answer and Counterclaim of Defendants Hudson Trading Corporation and Altomare (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60).

Deed—William King, as Executor and Trustee under the Last Will and Testament of Rose King, to Hudson Trading Corporation dated November 28, 1959 recorded December 21, 1959 in the Middlesex County Clerk's Office in Book 2145 of Deeds for said county at page 269 conveys the remaining undivided one-half interest in numerous lots including all of the lots set forth in the First Count.

Deed—William King, individually, to Hudson Trading Corporation dated November 9, 1960 recorded November 15, 1960 in the Middlesex County Clerk's Office in Book 2219 of Deeds for said county at page 423 conveys his right of courtesy in the remaining undivided one-half interest in numerous lots including all of the lots set forth in the First Count.

Deed—Hudson Trading Corporation to Frank Altomare dated November 12, 1959 recorded November 13, 1959 in the Middlesex County Clerk's Office in Book 2136 of Deeds for said county at page 422 conveys an undivided one-quarter interest in numerous lots including all of the lots set forth in the First Count.

ANSWER TO SECOND COUNT

1. Defendant plead all of the allegations contained in the Answer to the First Count and same are to be considered as though set forth in full herein subject to the following exception:

Exception—Deed Book 977, page 84 includes all lots set forth in the Second Count.

ANSWER TO THIRD COUNT

1. Defendant plead all of the allegations contained in the Answer to the First Count and same are to be con-

sidered as though set forth in full herein subject to the following exception:

Exception—Deed Book 977, page 84 includes all lots set forth in the Third Count.

ANSWER TO FOURTH COUNT

1. Defendant plead all of the allegations contained in the Answer to the First Count and same are to be considered as though set forth in full herein subject to the following exception:

Exception—Deed Book 977, page 84 only includes the easterly 5 feet of Lot 18 referred to in the Fourth Count.

ANSWER TO FIFTH COUNT

1. Defendants plead all of the allegations contained in the Answer to the First Count and same are to be considered as though set forth in full herein subject to the following exception:

Exception—Deed Book 977, page 84 only includes the westerly 10 feet of Lot 24 referred to in the Fifth Count.

ANSWER TO SIXTH COUNT

1. Defendants plead all of the allegations contained in the Answer to the First Count and same are to be considered as though set forth in full herein subject to the following exceptions:

Exception—Deed Book 977, page 84 only includes Lot 29 referred to in the Sixth Count.

Exception—Deed Book 977, page 87 only includes Lot 28 and the easterly 15 feet of Lot 27 referred to in the Sixth Count.

Answer and Counterclaim of Defendants Hudson Trading Corporation and Altomare (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

ANSWER TO SEVENTH COUNT

1. Defendants plead all of the allegations contained in the Answer to the First Count and same are to be considered as though set forth in full herein subject to the following exception:

Exception—Deed Book 977, page 84 only includes the easterly 15 feet of Lot 30 referred to in the Seventh Count.

SEPARATE DEFENSE

Defendants, Hudson Trading Corporation and Frank Altomare, assert that the matters complained of by plaintiffs is "res adjudicata", they the defendants having been determined to be the lawful owners of the lands which are the subject matter of this civil action in a certain action concluded by Final Judgment dated December 8, 1960 entitled as follows:

> "Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. C 721 59, Herbert Harvey and Frank Altomare, Plaintiffs, vs. Township of Woodbridge, et als., Defendants."

COUNTER-CLAIM

Defendants, Hudson Trading Corporation, a corporation of the State of New Jersey, with its principal office at 127 Hudson Street, Hackensack, Bergen County, New Jersey, and Frank Altomare and Amelia Altomare, his wife, residing at 245 Cedar Avenue, Hackensack, Bergen County, New Jersey, by way of Counter-claim say:

Answer and Counterclaim of Defendants Hudson Trading Corporation and Altomare (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

FIRST COUNT OF COUNTER-CLAIM

1. Counter-claimants are entitled to the possession of several tracts of land with the appurtenances, situate in the Township of Woodbridge, in the County of Middlesex and State of New Jersey, more particularly described as follows:

> Lots Numbered 13, 14, 15, 16, 17, 18, 24, 25, 26, 27, 28, 29 and 30 in Block Numbered 486-I all as shown and designated on a certain map entitled "Map of Lincoln Manor, Iselin, N. J., 1925", which map was filed in the Middlesex County Clerk's Office on March 7, 1925 in File No. 617 as Map Numbered 1068.

2. Counter-claimant, Hudson Trading Corporation, a corporation of the State of New Jersey, acquired an undivided one-half interest of said premises by Deed dated November 10, 1959 of record in the Middlesex County Clerk's Office in Book 2145 of Deeds at page 272 and the remaining one-half interest by Deed dated November 28, 1959 of record in the Middlesex County Clerk's Office in Book 2145 of Deeds at page 269.

Counter-claimant, Frank Altomare, acquired an undivided one-quarter interest of said premises by Deed dated November 12, 1959 of record in the Middlesex County Clerk's Office in Book 2136 of Deeds at page 422.

3. Plaintiffs, John Tyborowski and Stasia M. Tyborowski, his wife, took possession of Lots 13, 14 and the westerly 15 feet of Lot 15 in Block 486-I on March 11, 1953 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

Answer and Counterclaim of Defendants Hudson Trading Corporation and Altomare (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

4. Plaintiffs, Angelo A. Cifrodella and Gloria C. Cifrodella, his wife, took possession of the easterly 5 feet of Lot 15, all of Lots 16 and 17 and the westerly 15 feet of Lot 18 in Block 486-I on March 23, 1953 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

5. Plaintiffs, Richard J. Reach and Viola H. Reach, his wife, took possession of the easterly 5 feet of Lot 18, all of Lots 19 and 20 and the westerly 10 feet of Lot 21 in Block 486-I on March 10, 1953 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

6. Plaintiffs, John Clarence Keitel and Joan A. Keitel, his wife, took possession of the easterly 10 feet of Lot 21, all of Lots 22 and 23 and the westerly 10 feet of Lot 24 in Block 486-I on March 10, 1953 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

7. Plaintiffs, Theodorus Bron and Heiltje A. Bron, his wife, took possession of the easterly 10 feet of Lot 24, all of Lots 25 and 26 and the westerly 5 feet of Lot 27 in Block 486-I on March 28, 1959 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

8. Plaintiffs, John A. Vaticano and Alice G. Vaticano, his wife, took possession of the easterly 15 feet of Lot 27, all of Lots 28 and 29 and the westerly 5 feet of Lot 30 in

Answer and Counterclaim of Defendants Hudson Trading Corporation and Altomare (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

Block 486-I on March 11, 1953 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

9. Plaintiffs, John Lawrence Lyons and Margaret F. Lyons, his wife, took possession of the easterly 15 feet of Lot 30 in Block 486-I on March 12, 1953 and since that date have deprived Counter-claimants, Hudson Trading Corporation and Frank Altomare, and their predecessors in title of the possession of said premises.

10. Counter-claimants have been informed that plaintiffs in possession or those in possession prior to them, have erected substantial improvements upon or part of the premises hereinabove described. No claim is made as to such improvements and plaintiffs may remove and retain ownership of such improvements.

WHEREFORE, Counter-claimants demand judgment against the plaintiffs: (a) for possession of said premises, (b) for mesne profits based on the value of the land and (c) for costs.

SECOND COUNT OF COUNTER-CLAIM

1. On July 26, 1960, by Assignment of that date, William King, Executor and Trustee under the Last Will and Testament of Rose King, deceased, former owner of an undivided one-half interest of the lands and premises hereinbefore described in Paragraph one of the First Count of this Counter-claim, conveyed the undivided one-half share of all the rents, issues and profits on and of the lands and premises aforesaid which had accrued to said Rose King, deceased (from the time she was deprived of her

possession of same to the date that her interest in said premises was conveyed to Hudson Trading Corporation), to Frank Altomare aforesaid.

2. On December 12, 1960, by Assignment of that date, Bessie Sachs, former owner of an undivided one-half interest of the lands and premises hereinbefore described in Paragraph one of the First Count of this Counter-claim, conveyed her undivided one-half share of all the rents, issues and profits on and of the lands and premises aforesaid which had accrued to her (from the time she was deprived of her possession of same to the date that her interest in said premises was conveyed to Hudson Trading Corporation) to Frank Altomare aforesaid.

3. Counter-claimant, Frank Altomare, is entitled to mesne profits based on the value of the land from January 1, 1955 to the date that possession is restored to Hudson Trading Corporation and Frank Altomare less so much thereof as may accrue to Hudson Trading Corporation under the First Count of this Counter-claim.

WHEREFORE, Counter-claimant, Frank Altomare, demands Judgment against the plaintiffs (a) for mesne profits based on the value of the land for 6 years last past except as aforesaid and (b) for costs.

WILLIAM S. GRIMALDI,
Attorney for Defendants and Counter-claimants, Hudson Trading Corporation and Frank Altomare; also Amelia Altomare.

Plaintiffs' Answer to Counterclaim (Re: *Theodorus Bron, et al. v. Harry Weintraub, et al.*, Docket No. C-754-60)

(*Filed July* 5, 1961.)

The plaintiffs answering the counterclaim filed herein say:

As to the First Count

1. They deny the allegations contained in paragraphs 1 and 2.

2. The several plaintiffs admit that they took possession of the lands and premises as alleged in paragraphs 3, 4, 5, 6, 7, 8 and 9 and that they and their predecessors in title made improvements to said lands and premises in reliance upon their title thereto as alleged in paragraph 10, but each of said plaintiffs deny the allegations contained in the several paragraphs immediately above referred to that they have deprived the counterclaimants of possession to said premises or that the counterclaimants have any right to possession of said premises.

As to the Second Count

1. They deny each of the allegations contained in paragraphs 1, 2 and 3 of said Count.

As a Separate and Distinct Defense to Each Count of Said Counterclaim

these plaintiffs say:

1. The defendants purchased or otherwise acquired their purported interest in the lands and premises described in the counterclaim at a time when they knew and had actual knowledge of the inaction and silence of the heirs at law of Harry Weintraub, and the failure of said persons to

Plaintiffs' Answer to Counterclaim (Re: Theodorus Bron, et al. v. Harry Weintraub, et al., Docket No. C-754-60)

pay taxes upon said lands and premises for a period of upwards of twenty years. Said plaintiffs also knew, at the time of their acquisition of the alleged interest in said land and premises, that these plaintiffs and others had, believing in the validity of their title, expended vast sums of money in the development and improvement of said lands and in the construction of improvements on said lands, and in the inquiring of title thereto. The defendants paid but a nominal and small consideration for said property, intending and hoping to secure a windfall therefor.

WHEREFORE the defendants are estopped from asserting any interest or title in or to the lands and premises or any right of redemption thereof.

2. These plaintiffs repeat the allegations contained in paragraph 1 as though the same were set forth at length herein, and allege that the counterclaimants are barred by laches from asserting any right or interest in the property.

3. The present owners of said lands and premises, the plaintiffs herein, and their predecessors in title have been in actual possession of said lands and premises for more than twenty years, and the defendants-counterclaimants are barred from bringing any action by reason of the statute of limitation of the State of New Jersey.

4. On or about December 13, 1935, the premises known as Lots 13 to 30 inclusive, Block 486-I on the official tax map of the Township of Woodbridge was struck off and sold to the Township of Woodbridge for the sum of $228.28, together with interest at 8% from December 13, 1935. The certificate of sale was recorded in the Middlesex County Clerk's office in mortgage book 1175 page 477. Subsequently the Township of Woodbridge instituted foreclosure proceedings in respect to such tax sale certificate in

an action in the Superior Court of New Jersey, Chancery Division, wherein it was the plaintiff and Danwil Developers, Inc., a New Jersey corporation, was defendant, and a final decree was entered therein on February 5, 1941, which final decree was recorded on February 10, 1941 in deed book 1185 page 370. In October of 1952 the Township of Woodbridge sold the lands and premises to Parkway Gardens, Inc., a New Jersey corporation for valuable consideration and said deed was recorded in book 1648 on page 513. Thereafter Parkway Gardens, Inc., with extensive public notice, effected a subdivision of the total premises covered under the deed and developed the lands and premises by constructing houses thereon and by improving the tract of lands through the installation of water, streets, sewer and the like. In addition, Parkway Gardens, Inc. and others constructed buildings upon the lands and premises which were subsequently conveyed to the various plaintiffs herein, who also expended money and paid taxes thereon. Factually the records will disclose that not a dollar of taxes was paid by Harry Weintraub or any of his heirs and assigns against said premises from 1931 when the premises were abandoned by the said Harry Weintraub and his heirs. When the property was conveyed by the Township of Woodbridge to Parkway Gardens, Inc., the lands and premises had a nominal value of $25 a 50 foot lot, and said lands and premises were enhanced only by reason of the amount expended by Parkway Gardens Inc. in the general development of its tract and the construction of single family dwellings thereon and improvements thereto.

If the defendants secured any interests in said lands and premises it was for the purpose of harassing and impairing the title to the lands owned by the plaintiffs, all with the full knowledge of the facts aforesaid and with

the intent of impairing the title to said lands and premises and harassing the plaintiffs, or with the hope of securing a windfall and with actual knowledge of the inaction and silence of Harry Weintraub and his heirs at law, all of which bars and estops them from asserting any title or interest in said lands and premises by reason of their unclean hands and estoppel.

BOYD, DODD, KEER & BOOTH,
Attorneys for plaintiffs,
By ERNEST F. KEER, JR.,
a partner.

Answer of Defendant Harvey (Re: *Theodorus Bron, et al.*, v. *Harry Weintraub, et al.*, Docket No. C-754-60)

(Filed May 2, 1961.)

Defendant, Herbert Harvey, residing at Route 59, Spring Valley, New York, says:

1. The Answer of Hudson Trading Corporation; Frank Altomare and Amelia Altomare, his wife, is hereby adopted as the answer of this defendant as to all Counts as though set forth in full.

First Separate Defense

The Separate Defense of Hudson Trading Corporation and Frank Altomare is hereby adopted as the Separate Defense of this defendant as though set forth in full.

Second Separate Defense

The interest of the defendant, Herbert Harvey, is prior to that of plaintiffs inasmuch as said plaintiffs have no valid claim on any of the properties concerned in this Civil Action.

William S. Grimaldi,
Attorney for Defendant,
Herbert Harvey.

Notice of Appeal

(*Filed October* 25, 1962.)

Notice is hereby given that Theodorus Bron, et als, plaintiffs Docket No. C.754-60, and Emile W. Saulnier, et als, defendants Docket No. L-6513-60, appeal to the Superior Court of New Jersey, Appellate Division, from the whole of the final judgment of the Superior Court, Chancery Division, entered on September 14, 1962 in favor of Hudson Trading Corporation, a New Jersey corporation, and Frank Altomare, defendants Docket No. C.754-60, and against Theodorus Bron, et als, plaintiffs Docket No. C.754-60, and in favor of Hudson Trading Corporation and Frank Altomare, plaintiffs Docket No. L.6513-60, and against Emile Saulnier, et als, defendants Docket No. L.6513-60.

BOYD, DODD, KEER & BOOTH,
Attorneys for Theodorus Bron, et als, Docket No. C.754-60 Plaintiffs-Appellants and for Emile W. Saulnier, et als, Docket No. L.6513-60 Defendants-Appellants.
By: ERNEST F. KEER, JR.,
A Member of the Firm.

Dated: October 22, 1962.

I certify that on September 19, 1962 I complied with the requirements of R.R. 1:2-8e.

ERNEST F. KEER, JR.

SUPREME COURT OF NEW JERSEY.

A-75 SEPTEMBER TERM 1963.

THEODORUS BRON, et al.,
Plaintiffs-Appellants,

vs.

HARRY WEINTRAUB, et al.,
Defendants-Respondents.

HUDSON TRADING CORPORATION, et al.,
Plaintiffs-Respondents,

vs.

EMILE W. SAULNIER, et al.,
Defendants-Appellants.

OPINION.

(*Filed April* 20, 1964.)

Argued February 4, 1964—Decided

Mr. Robert N. Wilentz argued the cause for appellants (*Messrs. Wilentz, Goldman & Spitzer,* of counsel; *Messrs. Boyd, Dodd, Keer & Booth,* attorneys).

Mrs. Sylvia B. Pressler argued the cause for respondents.

The opinion of the Court was delivered by WEINTRAUB, C. J.

In 1935 the Township of Woodbridge sold certain vacant lands for unpaid taxes and itself was the buyer at the sale. In 1940 it foreclosed the tax sale certificates in the former Court of Chancery. That proceeding ran against Danwil Developers, Inc., as owner. However, in 1929 that com-

pany had conveyed to El-Ka Holding Co., Inc., which in turn conveyed to Harry Weintraub in 1931. Weintraub apparently was the secretary of both corporations. He died intestate in 1933, survived by two sisters who lived in California. The searcher did not pick up the conveyances just mentioned and hence the 1940 foreclosure suit ran only against Danwil Developers, Inc., as we have said.

In 1952 Woodbridge conveyed the lands to a developer who erected homes and sold them for $10,000 to $11,000 each. Ten such parcels are here involved. In 1959 one of the homes was resold and a search in that connection revealed the failure to bar the Weintraub interests. The township was asked to foreclose those interests, and it started a suit to that end. *N.J.S.A.* 54:5–86.1 *et seq.* Judgment was entered fixing November 13, 1959 as the date by which the unknown heirs of Weintraub had to redeem or be barred. At the eleventh hour Hudson Trading Corporation and Frank Altomare redeemed on the basis of deeds obtained from the Weintraub heirs (the deeds ran to Hudson which in turn conveyed a quarter interest to Altomare).

The present actions ensued, the householders seeking to quiet title and Hudson and Altomare demanding possession and mesne profits. Hudson and Altomare conceded the householders were equitably entitled to remove the improvements or to buy the land at its value unaffected by the improvements. The trial court entered a judgment under which the householders would have to pay for the land the sum of $19,555.11, found to be its value as of the time of the deeds to Hudson and Altomare, plus mesne profits of $2,856.91. Hudson had paid the Weintraub heirs but $400. The Appellate Division affirmed and we granted certification. 40 *N. J.* 507 (1963).

The householders urge that Hudson and Altomare be declared constructive trustees and be required to convey title upon payment of the $400 they gave the Weintraub heirs. Alternatively they say the lands should be valued

as of a date prior to the date of the deeds to Hudson, and that, whatever date is approved, the lands should be valued without enhancement due to streets, sidewalks, sewers, and curbing. As to the last proposition, it is unclear whether the appraisers had excluded those items in valuing the "unimproved" land.

We need consider only the first proposition, that Hudson and Altomare should receive no more than what they paid the Weintraub heirs, since we are satisfied the householders are entitled to prevail upon it.

Here ten homes were purchased in the *bona fide* belief that title was good. The defect in the 1940 foreclosure was discovered in 1959, some 28 years after the original owners of the vacant land had last paid a penny of taxes. The municipality started a second suit to perfect the title, and in that action it was necessary to advertise as against the Weintraub heirs. In that way Hudson learned of an opportunity to make some money out of the predicament of these householders.

Hudson located Weintraub's sisters in California. Exactly when we do not know, but on November 7, only six days before the date fixed for redemption, one Herbert Harvey wrote to them. His letter opened with a statement that it related to "lots in Middlesex County, New Jersey, in which, according to the record, the late Harry Weintraub had an interest." That the interest was ownership in fee was not disclosed. The letter correctly said the property was sold for taxes in 1935 and a foreclosure action was brought in 1940, but added only that the foreclosure action was deemed "possibly defective." It continued that "you might claim an interest" and we are writing to inquire whether you "will furnish a voluntary release of your possible claim" for a "courtesy consideration" of $50 "for the release." It adds that "The required instrument, in the form of a quit claim deed, is enclosed." We interpolate that trial counsel for Hudson and Altomare placed on the record:

> "It is Mr. Harvey's practice to take quit-claim deeds. I say that of all the deeds he gets, 90 percent are quit-claim deeds. He knows by law a quit-claim deed is just as good as any other kind of deed."

Mr. Harvey was well informed in that regard, *N.J.S.A.* 46:5–1 *et seq.*, but we assume, as no doubt he did, that the recipient of his letter would likely think only of some claim to be released to the existing holder of title in fee. Indeed the letter said the deed "will have the effect of releasing any claim which you have or may have in the land therein described." Finally the letter noted that "this instrument will serve its purpose only if it reaches us without delay—actually no later than November 13, which seems practically return mail." Appreciation was promised for "your co-operation" and the letter closed "With thanks for your courtesy in the matter."

This letter was palpably deceptive. It was deceptive as to the nature of the outstanding interest. It was deceptive as to identity of the parties on whose behalf it was written. In the latter respect, if no more appeared, it would permit an inference that Harvey led the Weintraub heirs to believe he was acting for the householders, and upon such a finding a constructive trust could be imposed in their favor. *Bell v. Smith,* 159 *Fla.* 817, 32 *So. 2d* 829 (*Sup. Ct.* 1947), annotated 175 *A.L.R.* 700 (1948). The cause, however, was not tried on the theory of fraud, and since we are told there were further communications with the Weintraub heirs not spread on the record, we should not decide the case on that basis. Nonetheless we refer to the fraudulent nature of this communication as a sample of the kind of thing to be expected if we hold that strangers may exploit these situations.

Let us look at the interests involved and the impact of Hudson's activities upon them.

We are dealing with tax titles. Contrary to early hostility to such titles, the policy today is to support them,

thereby to aid municipalities in raising revenue. To that end *N.J.S.A.* 54:5–85 provides:

> "The provisions of this article shall be liberally construed as remedial legislation to encourage the barring of the right of redemption by actions in the Superior Court to the end that marketable titles may thereby be secured."

Everybody knows that taxes must be paid. True, there may be instances in which the individual concerned is unaware of his property interest, but such cases are rare. Usually the owner omits to pay knowing the end result will be a tax sale. It is therefore understandable that the Legislature found it fair to bar the right to redeem by a strict foreclosure, *i.e.*, by a judgment that payment be made by a fixed date, in default of which the right to redeem shall end, rather than by a sale as in the case of the foreclosure of a mortgage. The point we stress is that, whereas with respect to the initial sale for taxes, the statute intends to attract third parties to the opportunity to acquire the property and provides for public notice to that end, *N.J.S.A.* 54:5–25 and 26, there is no like policy to invite the public to participate with respect to the foreclosure of the right to redeem. In *Mitsch v. Owens*, 82 *N. J. Eq.* 404 (*Ch.* 1913), in holding that an earlier tax statute did not require a foreclosure by sale, Chancellor Walker said (*p.* 406):

> "In my judgment, the law does not intend to make provision that a total stranger may deprive the purchaser at a tax sale of his right to perfect his title, by strict foreclosure, on the one hand, or usurp the owner's right to redeem, by permitting the land to be bought away from him, on the other hand."

Hence the foreclosure process concerns only the holder of the tax sale certificate and the holders of existing interests in the property. Hudson learned of this situation, not because it was the policy of the law to advertise to solicit its interest, but because of the fortuitous circum-

stance that the foreclosing municipality had not located the Weintraub heirs. If they had been found, they could have been served without the need for publication. *R. R.* 4:4–5. In short, our rules of court called for this public notice solely to reach the holders of existing interests, but Hudson read a communication intended for another and sought to turn that information to its own gain, thereby depriving the householders of a chance to work out their misfortunes with the holders of the outstanding interests upon a basis presumably no more onerous than the basis upon which Hudson acquired those interests.

In attacking the legality of Hudson's activity, the householders appeal to public policy, the ultimate source of justice. Public policy has been described but never quite defined. *Ready v. National State Bank of Newark,* 117 *N. J. L.* 554, 559 (*E. & A.* 1937); *Girard Trust Co. v. Schmitz,* 129 *N. J. Eq.* 444, 456-60 (*Ch.* 1941). The Supreme Court of Ohio said in *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v. Kinney,* 95 *Ohio St.* 64, 68, 115 *N. E.* 505, 506 (1916):

> "What is the meaning of 'public policy'? A correct definition, at once concise and comprehensive, of the words 'public policy,' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the word 'fraud' or the term 'public welfare.' In substance, it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.
>
> Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear

consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, even though such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court. * * *"

Reflecting as it does the common conscience, public policy changes in its demands with the needs and the widely held feelings of the times. *Henningsen v. Bloomfield Motors, Inc.*, 32 *N. J.* 358, 403 (1960). As was said in *Brooks v. Cooper*, 50 *N. J. Eq.* 761, 769 (*E. & A.* 1893):

"'It has been declared that public policy is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex. The relations of society become from time to time more complex; statutes defining and declaring public and private rights multiply rapidly, and public policy often changes as the laws change, and therefore new applications of old principles are required. *Davies v. Davies*, 36 *Ch. Div.* 364.

Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right; whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of the administration of the law; whatever tends to interfere with or control the administration of the law as to executive, legislative or other official action, whenever embodied in and made the subject of a contract, the contract is against public policy and therefore void and not susceptible of enforcement."

Despite the apparent abstractness of the concept of public policy in its restraint upon individual conduct, there is a large measure of guidance and predictability, for as Professor Corbin points out, men of probity and intelligence can greatly reduce the risk "by an unselfish use of conscience and common sense." 6A *Corbin, Contracts* § 1374, *p.* 6 (1962). His discussion is worth repeating (*p.* 6):

> "There is still another source of 'illegality,' besides statute and judicial decision. That source is the great common background of life from which come both legislation and common law. It is the prevailing practices of the community of people and their notions as to what makes for the general welfare. Bargains are judged by the folkways and mores of the time. A bargain may be illegal because it is contrary to 'Public Policy,' as that is understood by the judges and administrative officers.
>
> A man of business can not escape feelings of uncertainty if the legality of his bargains is to be determined in this fashion. How can these officials know 'public policy,' a matter as to which there is often such violent disagreement? And how can a layman determine what the officials will decide? Here, again, however, we shall advise that a man of probity and intelligence can avoid excessive risk without materially nullifying his enterprise. In most of his transactions the question of legality does not in fact arise. In most of those in which it does arise, the public policies involved have already been declared by statute or judicial decision. In the number remaining, some of which may be very important indeed, he knows that he will be judged by the practices and opinions of his fellow men, practices and opinions in the midst of which he was born and by which his own mind and conscience have been formed and educated. For a man of probity and intelligence, the risk involved in making a decision and acting on it need not be very great. But 'probity'

varies in degree, and intelligence may be lacking. Many men have believed that they were unjustly penalized for action wholly consistent with the public welfare. It is true that lack of probity and a minimum of intelligence may be found in the officials who decide as well as in the man who bargains. That is a risk that we can not wholly avoid, even in a democratic society. The best advice that can be given in this small residuum of cases is that risk of illegality can be avoided only by leaning over backwards and deciding against one's own interest. The bold and resolute may fight and win; but they should be prepared to take the medicine if they lose."

With respect to the factual pattern before us, no one disputes the right of the holders of existing interests to convey them to third persons if they wish.[1] What is challenged is the legality of the intrusion into the scene by third persons who seek only to further their own interests rather than the interests already on hand. As we have pointed out, the policy of the statute is to support tax titles, a policy which overall is burdened by the conduct before us. The burden upon individuals situated as are the householders in this case is evident enough. These manifest hurts should not be tolerated unless it can be said that some other legitimate interest or advantage is served. We find none. We see no social value or contribution in the activities of Hudson. On the contrary, decent men must sense only revulsion in this traffic in the misfortunes of others.

We are not aware of any precedent precisely in point, although reference could appropriately be made to the established hostility toward so-called "heir-hunting." See

---

[1] We note that in some jurisdictions there may not be a sale of an interest in lands adversely held by another. See 10 *Am. Jur., Champerty and Maintenance* § 18, *p.* 563. This rule originated in an English statute which antedated the Revolution and which was held not to be effective in our State. The issue was initially left open in *Den v. Geiger*, 9 *N. J. L.* 225, 234-35 (*Sup. Ct.* 1827), and later resolved, as we have said, in *Schomp v. Schenck*, 40 *N. J. L.* 195, 206 (*Sup. Ct.* 1878). See also *Bouvier v. Baltimore & New York Ry.*, 67 *N. J. L.* 281, 291 (*E. & A.* 1902).

Carey v. Thieme, 2 *N. J. Super.* 458, 466 (*Ch. Div.* 1949); Annotation, 171 *A. L. R.* 351 (1947); note, 7 *Vand. L. Rev.* 104 (1953). In any event, public policy is more than a mere summation of its past applications. It has been said that "Its virtue and vigor lie in its flexibility of application, and while reported cases furnish guides, they rarely are compelling as precedent." *Fidelity Union Trust Co. v. Reeves,* 96 *N. J. Eq.* 490, 493 (*Ch.* 1924), affirmed o.b. 98 *N. J. Eq.* 412 (*E. & A.* 1925). As Judge Desmond said in *Latham v. Father Divine,* 299 *N. Y.* 22, 27, 85 *N. E. 2d* 168, 170 (*Ct. App.* 1949), the applicability of the concept of a constructive trust "is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them." We have no doubt the common conscience condemns the conduct of Hudson and Altomare as an undue interference with the rights of the householders. Hudson and Altomare having acquired the outstanding title under "circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same." 4 *Pomeroy, Equity Jurisprudence* (*5th ed.* 1941) § 1053, *p.* 119. The householders are equitably entitled to the property upon the payment of the sum of $400 plus simple interest from the date of the payment to the Weintraub heirs.

The judgments are therefore reversed and the matters remanded to the trial court with directions to enter judgments in harmony with this opinion.

SUPREME COURT OF NEW JERSEY.

APPEAL DOCKET No. 4154.

THEODORE BRON, et al.,
Plaintiffs-Appellants,

vs.

HARRY WEINTRAUB, et al.,
Defendants-Respondents.

HUDSON TRADING CORPORATION, et al.,
Plaintiffs-Respondents,

vs.

EMILE W. SAULNIER, et al.,
Defendants-Appellants.

Civil Action.
(On Appeal.)

MANDATE ON REVERSAL.

This cause having been duly argued before this Court by Mr. Robert M. Wilents, counsel for the appellant and Mrs. Sylvia B. Pressley, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twentieth day of April, 1964.

JOHN H. GILDEA
Clerk of the Supreme Court
A TRUE COPY
JOHN H. GILDEA, *Clerk*

FILED
Apr. 20, 1964
John H. Gildea, Clerk

SUPERIOR COURT OF NEW JERSEY.

APPELLATE DIVISION

THEODORE BRON, et al.,
Plaintiffs-Appellants,

vs.

HARRY WEINTRAUB, et al.,
Defendants-Respondents.

HUDSON TRADING CORPORATION, et al.,
Plaintiffs-Respondents,

vs.

EMILE W. SAULNIER, et al.,
Defendants-Appellants.

Civil Action.
(On Appeal.)

REMAND ON REVERSAL.

ORDER

(*Filed June* 5, 1964.)

This matter being opened to the Court by Ernest F. Keer, Jr., of the firm of Boyd, Dodd, Keer and Booth, attorneys for the appellants, and it appearing that a judgment was entered in the Superior Court, Chancery Division in the action under Docket No. C-754-60 against the plaintiffs-appellants and in favor of the defendants-respondents, and that a judgment was entered in the Superior Court Chancery Division in the action under Docket No. L-6513-60 in favor of plaintiffs-respondents and against defendants-appellants, and it further appearing that this Court by its mandate dated May 6, 1963 did affirm said judgments with costs, and it further appearing that the within actions were appealed to the Supreme Court of New Jersey, which Court did by its mandate on reversal dated April 20, 1964, order

and adjudge that the judgment of the Superior Court of New Jersey, Appellate Division, be in all things reversed and set aside and for nothing holden with costs;

It is on this 5th day of June, 1964,

ORDERED, that said mandate and judgment of the Supreme Court be and the same are hereby made the order and judgment of this Court, and it is further

ORDERED, that the mandate on affirmance of this Court dated May 6, 1963, be and the same is hereby vacated and set aside, and it is further

ORDERED, that the record and proceedings in this cause be remitted to the Chancery Division and when remitted to the Chancery Division be proceeded with in accordance with the rules and practice relating to this Court and consistent with the opinion of the Supreme Court.

...../s/
S. J. A. D.

We hereby consent to the form of the within order

SYLVIA B. PRESSLER,
Attorney for Respondents
BOYD, DODD, KEER AND BOOTH,
Attorney for Appellants
By: ERNEST F. KEER, JR.,
A Member of the Firm.

I hereby certify that the foregoing is a true copy of the original on file in my office.

...../s/
Clerk

SUPERIOR COURT OF NEW JERSEY.
CHANCERY DIVISION, MIDDLESEX COUNTY.
DOCKET NOS. C-754-60, L-6513-60.

THEODORUS BRON, et al.,
Plaintiffs,
vs.
HARRY WEINTRAUB, et al.,
Defendants.

HUDSON TRADING CORPORATION, et al.,
Plaintiffs,
vs.
EMILE W. SAULNIER, et al.,
Defendants.

Civil Actions.
(Consolidated.)

AMENDED JUDGMENT—FINAL.

(*Filed June* 26, 1964.)

This matter being opened to the Court by Ernest F. Keer, Jr., of the firm of Boyd, Dodd, Keer and Booth, attorneys for Theodorus Bron, et. al., plaintiffs, Docket No. C-754-60 and Emile W. Saulnier, et. al., defendants, Docket No. L-6513-60 and Sylvia B. Pressler, attorney for Hudson Trading Corporation, a corporation of the State of New Jersey, and Frank Altomare, as defendants, Docket No. C-754-60 and plaintiffs' Docket No. L-6513-60, and on motion of Boyd, Dodd, Keer and Booth, for entry of judgment in accordance with the Opinion and Mandate of the Supreme Court of New Jersey, Docket No. A-75, September Term, 1963.

It is on this 26th day of June, 1964, ORDERED AND ADJUDGED as follows:

Hudson Trading Corporation, a corporation of the State of New Jersey and Frank Altomare are found to be constructive trustees for the respective plaintiffs of such interests as were acquired by them of the various premises hereinafter described through the following deeds: Bessie Sachs and Harry M. Sachs, her husband, dated November 10, 1959, recorded on December 21, 1959 in the Middlesex County Clerk's office in Book 2145 of deeds for said County at page 272; William King as Executor and Trustee under the Last Will and Testament of Rose King, dated November 28, 1959, recorded December 21, 1959 in the Middlesex County Clerk's office in Book 2145 of deeds for said County at page 269; William King, individually, dated November 9, 1960, recorded on November 15, 1960 in the Middlesex County Clerk's office in Book 2219 of deeds for said County on page 423, and deed of Hudson Trading Corporation to Frank Altomare, dated November 12, 1959, recorded November 13, 1959 in the Middlesex County Clerk's office in Book 2136 of deeds for said County on page 422.

It is FURTHER ORDERED AND ADJUDGED that within ten days from the date hereof, and upon the payment to them by or on behalf of the plaintiffs of the sum of $400.00 plus simple interest from November . . . 1959, the defendants, Hudson Trading Corporation, a corporation of the State of New Jersey, and Frank Altomare and Amelia Altomare, make, execute, acknowledge and deliver to the persons hereinafter named, bargain and sale deeds with covenants against grantors' acts, to the respective parties hereinafter named for their respective properties designated, and that such deeds be recorded in the office of the Clerk of Middlesex County, and that in the event of the failure of said defendants so to do, this judgment shall have the same force and effect in this State and in all its courts and elsewhere as if such conveyance had been made in conformance with this judgment.

It is FURTHER ORDERED AND ADJUDGED that one of the aforesaid deeds of conveyance by the defendants shall be

to Theodore Bron and Heiltje A. Bron, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 10 feet of Lot 24, all of Lots 25 and 26, and the westerly 5 feet of Lot 27, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925, and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to John Tyborowski and Stasia M. Tyborowski, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as Lots 13, 14 and the westerly 15 feet of Lot 15, in Block 486-I, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1067, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to Angelo A. Cifrodella and Gloria C. Cifrodella, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 5 feet of Lot 15, all of Lots 16 and 17, and the westerly 15 feet of Lot 18, in Block 486-I, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to Richard J. Reach and Viola H. Reach, his wife,

for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 5 feet of Lot 18, all of Lots 19 and 20 and the westerly 10 feet of Lot 21, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to John Clarence Keitel and Jean A. Keitel, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 10 feet of Lot 21, all of Lots 22 and 23 and the westerly 10 feet of Lot 24, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to John A. Vaticano and Alice J. Vaticano, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 15 feet of Lot 27, all of Lots 28 and 29 and the westerly 5 feet of Lot 30, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to John Lawrence Lyons and Margaret F. Lyons, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the easterly 15 feet of Lot 30 and the westerly 40 feet of Lots 31 to 35, both inclusive, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to Emile W. Saulnier and Jeanette G. Saulnier, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as Lots 31, 32 and 33 and the southerly ½ of lot 34, in Block 486-G, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

One of the aforesaid deeds of conveyance by the defendants shall be to Joseph Frances Moran and Eleanor Moran, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as Lots 27, 28 and 29 in Block 486-J, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 817.

One of the aforesaid deeds of conveyance by the defendants shall be to Francis J. Straulina and Virginia D. Straulina,

his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

> KNOWN and designated as the westerly parts of Lots 31, 32, 33, 34 and 35 and all of Lot 30 in Block 486-J, on Map entitled, "Map of Lincoln Manor," dated March 1925 and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617.

It is FURTHER ORDERED AND ADJUDGED, that the said defendants, Harry Weintraub, his heirs, devisees, personal representatives and his, their or any of their successors in right, title and interest, and Mrs. Weintraub, wife of Harry Weintraub, Rose Weintraub King, her heirs, devisees and personal representatives or her, their or any of their successors in right, title and interest, and William King, husband of Rose Weintraub King, Bessie Weintraub Sachs and Harry M. Sachs, her husband, Hudson Trading Corporation, a New Jersey corporation, Frank Altomare and Amelia Altomare, his wife, and Herbert Harvey, shall upon payment of the aforesaid amount of $400.00 plus simple interest as hereinbefore provided, have no estate, interest or right in or lien or encumbrance upon said lands and premises or any part thereof described in said complaint and in this judgment, and

It is FURTHER ORDERED AND ADJUDGED that as to all of the lands and premises so far as relates to any claim or claims thereon by or on behalf of the said defendants, the title to said plaintiff in and to the same, or any part thereof, is hereby determined, fixed, settled and decreed to be good.

FRANK J. KINGFIELD
J. S. C.

SUPERIOR COURT OF NEW JERSEY.
APPELLATE DIVISION.

THEODORUS BRON, et al.,
Plaintiffs,
vs.
HARRY WEINTRAUB, et al.,
Defendants.
DOCKET No. C 754 60.

HUDSON TRADING CORPORATION, et al.,
Plaintiffs,
vs.
EMILE W. SAULNIER, et als.,
Defendants.
DOCKET No. L 6513 60.

Civil Actions.
(Consolidated.)

NOTICE OF APPEAL.

(*Filed August* 10, 1964.)

Notice is hereby given that Hudson Trading Corporation and Frank Altomare, parties in the above captioned matters, appeal to the Superior Court, Appellate Division, from the whole of the amended final judgment entered by the Superior Court, Chancery Division, in the above entitled actions in favor of Theodorus Bron, et al., and Emile W. Saulnier, et als., parties in the above captioned matters, entered on June 26, 1964, excepting that portion thereof that reads as follows: "one of the aforesaid deeds of conveyance by the defendants shall be to Theodore Bron and Heiltje A. Bron, his wife, for the following described lands and premises located in the Township of Woodbridge, County of Middlesex and State of New Jersey, being more particularly described as follows:

KNOWN and designated as the easterly 10 feet of Lot 24, all of Lots 25 and 26, and the westerly 5 feet of Lot

27, in Block 486-I, on map entitled, "Map of Lincoln Manor," dated March 1925, and filed in the Middlesex County Clerk's Office on March 7, 1925 as Map No. 1068, File No. 617."

Dated: August 7, 1964.

WILLIAM S. GRIMALDI,
Attorney for Appellants.

I certify that on August 7, 1964, I complied with the requirements of R. R. 1:2–8(e).

WILLIAM S. GRIMALDI,
Attorney for Appellants.

STATEMENT OF QUESTIONS INVOLVED

The Judgment of the Trial Court acting upon an Opinion of the Supreme Court of the State of New Jersey filed herein is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that the legal owners of property are deprived of same without due process of law under any or all of the following circumstances:

1. When the Trial Court acting upon a mandate based on an opinion of the Supreme Court of the State of New Jersey, breaks out of the rigid framework of the matters contained in the opinion and by its Judgment causes property not falling within the opinion to be taken from the rightful owners.

2. When the Trial Court acts upon a mandated based on an opinion of the Supreme Court, which opinion is arrived at without any evidence having been submitted in the litigation, it may consider said opinion as a guide line, however, the Trial Court must implement said opinion by evidence to be called for by the Trial Court as any adjudication cannot take property from the rightful owners without any evidence being submitted in the litigation.

3. When the Trial Court enlarges upon the quantity of property under consideration by the Supreme Court in its Opinion and divests the legal owner of a greater amount of property than is properly involved and included in the Opinion.

SUPREME COURT OF NEW JERSEY.

No. ..... SEPTEMBER TERM.

THEODORE BRON,
Plaintiffs-Appellants,
vs.
HARRY WEINTRAUB,
Defendants-Respondents.

Action On Certification.

ORDER.

Pursuant to Rule 1:10-1 it is ORDERED that the appeal from the judgment entered in this cause on June 24, 1964, in the Superior Court, Chancery Division, now pending in the Superior Court, Appellate Division (A-1172-63), be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

ORDERED that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals as of right, in accordance with the rules of this Court; and it is further

ORDERED that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the entry of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 22nd day of January, 1965.

JOHN H. GILDEA,
Clerk of the Supreme Court.

Filed: January 22, 1965.
JOHN H. GILDEA, *Clerk.*

SUPREME COURT OF NEW JERSEY.

A-107 SEPTEMBER TERM 1964.

THEODORUS BRON, et al.,
Plaintiffs-Respondents,

vs.

HARRY WEINTRAUB, et al.,
Defendants-Appellants.

HUDSON TRADING CORPORATION, et al.,
Plaintiffs-Appellants,

vs.

EMILE W. SAULNIER, et al.,
Defendants-Respondents.

Per Curiam Opinion.

Argued May 17, 1965—Decided June 1, 1965.

Mr. William S. Grimaldi argued the cause for appellants.

Mr. Robert N. Wilentz argued the cause for respondents (*Messrs. Wilentz, Goldman & Spitzer,* of counsel; *Messrs. Boyd, Dodd, Keer & Booth,* attorneys).

The opinion of the Court was delivered PER CURIAM.

This is an appeal from an amended final judgment entered by the trial court following our decision in *Bron* v. *Weintraub*, 42 *N. J.* 87 (1964). We certified the appeal before the Appellate Division acted upon it.

The judgment under review complies with our mandate entered upon the prior appeal. It is accordingly affirmed.

SUPREME COURT OF NEW JERSEY.

APPEAL DOCKET No. 4654.

THEODORE BRON, et al.,
Plaintiffs-Respondents,

vs.

HARRY WEINTRAUB, et al.,
Defendants-Appellants.

Civil Action.
(On Appeal.)

MANDATE ON AFFIRMANCE.

This cause having been duly argued before this Court by MR. WILLIAM S. GRIMALDI, counsel for the appellant and MR. ROBERT N. WILENTZ, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court, Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court, Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the first day of June, 1965.

JOHN H. GILDEA,
Clerk of the Supreme Court.

Filed June 1, 1965.
JOHN H. GILDEA, *Clerk.*
A true copy.
JOHN H. GILDEA,
Clerk.

SUPERIOR COURT OF NEW JERSEY.
CHANCERY DIVISION, MIDDLESEX COUNTY
DOCKET NO. C-721-59.

HERBERT HARVEY, et al.,
Plaintiffs,
vs.
TOWNSHIP OF WOODBRIDGE, et al.,
Defendants.
} Civil Action.

FINAL JUDGMENT.

The above entitled action having been heard in the presence of William S. Grimaldi, Esq., Attorney for Plaintiffs and Ernest F. Keer, Jr., Esq., of the firm of Boyd, Dodd, Keer and Booth, Attorneys for Defendants and the Court having considered the pleadings and the evidence and the argument of counsel and a certain Stipulation made by and between William S. Grimaldi, Esq., Attorney for Plaintiffs and Stewart M. Hutt, Esq., Attorney for Defendant, Township of Woodbridge, filed herein on November 16, 1960 and the Court being of the opinion that Judgment should be entered in favor of the Plaintiffs without costs:

It is on the 8th day of December, 1960, Ordered and Adjudged that Plaintiffs be allowed as a credit against the sum of $3,436.67 paid in redemption of Certificate of Sale Numbered 13477 covering Lots Numbered 13/30 both inclusive in Block Numbered 486-I, the sum of $2,478.41 being the total sum of taxes and interest improperly charged against Lots Numbered 13/18 both inclusive and Lots Numbered 24/30 both inclusive in Block Numbered 486-I, owned by Hudson Trading Corporation and Frank Altomare, successors in title to Harry Weintraub, deceased;

Be it further ordered that the Collector of Taxes of the Township of Woodbridge refund to Plaintiffs said sum of

$2,478.41, from the amount of $3,436.67 paid for redemption on November 13, 1959; and

Be it further ordered that the proper officials of the Township of Woodbridge execute and deliver a proper cancellation of that portion of Tax Sale Certificate Number 13477 covering Lots Numbered 13/18 both inclusive and 24/30 both inclusive in Block Number 486-I to the Plaintiffs herein.

FRANK J. KINGFIELD,
J.S.C.

The foregoing Final Judgment is approved as to form only.

William S. Grimaldi
s/ WILLIAM S. GRIMALDI,
Attorney for Plaintiffs.

Stewart M. Hutt
s/ STEWART M. HUTT,
Attorney for Defendant, Township of Woodbridge.

BOYD, DODD, KEER AND BOOTH
by Ernest F. Keer, Jr.
s/ ERNEST F. KEER, JR.,
Attorneys for Defendants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 513

HERBERT HARVEY,

Petitioner,

vs.

JOHN LAWRENCE LYONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

HERBERT HARVEY,

Petitioner,

vs.

JOHN LAWRENCE LYONS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Statement of the Case

Respondents disagree with the basic premise of petitioner's contention and with his statement of that premise as a fact at p. 4 of petitioner's brief. Petitioner states:

> "The facts on which public policy was involved were stated in the Opinion. They are not earlier in the record."

On the contrary, the facts in the New Jersey Supreme Court's opinion were fairly inferable from the extended colloquy of counsel and the admissions contained therein which were indeed part of the record.

Statement of Reasons in Opposition to Petition for a Writ of Certiorari

1. Petitioner was not a party to the appeal before the Supreme Court of New Jersey, whose decision he now seeks to have reviewed.

2. The federal question should have been raised by the petitioner immediately after the first decision of the New Jersey Supreme Court, by petitioning this Court for a writ of *certiorari* to the New Jersey Supreme Court from its initial opinion.

3. There are no constitutional rights involved warranting the granting of a petition for a writ of *certiorari*.

POINT I

Petitioner was not a party to the appeal before the Supreme Court of New Jersey, whose decision he now seeks to have reviewed.

The judgment as to which review is sought is the judgment of the Supreme Court of New Jersey, dated June 1, 1965 (PA47a)* on an appeal by Hudson Trading Corporation (hereinafter referred to as "Hudson") and Frank Altomare (hereinafter referred to as "Altomare") (PA43a). While petitioner claims, without support, that said parties have assigned their action to him (PB5, Fn.t)**. the fact of the matter is that petitioner is pursuing this appeal on his own behalf from the judgment of the Chancery Division of

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* PA refers to appendix attached to Petitioner, Herbert Harvey's Petition for a Writ of *Certiorari*.

** PB refers to brief of Petitioner contained in Petition for a Writ of *Certiorari*.

the Superior Court of New Jersey, dated June 26, 1964, a trial court, from which he never appealed (PA37a-42a). The time to appeal from a civil judgment of a trial court being forty-five days, has long since expired. N. J. Sup. Ct. (Civ.) R.R. 1:3-1(b). This judgment of the trial court was appealed by Hudson and Altomare and upon review by the Supreme Court of New Jersey was affirmed *per curiam* (PA47a). Thus, Petitioner not having appealed from the trial court decision, and not having participated in the Supreme Court appeal has no standing now to appeal to this Court and is, therefore, bound by the amended final judgment of the trial court from which he never appealed.

POINT II

The Federal question should have been raised immediately after the first decision of the New Jersey Supreme Court, by petitioning this Court for a writ of *certiorari* to the New Jersey Supreme Court from its initial opinion.

When the New Jersey Supreme Court rendered its first opinion, dated April 20, 1964 (PA23a-32a) on an appeal by the householders*, it was quite clear from a reading of that opinion that it had conclusively determined the matter in favor of all of the householders and that it was ordering the trial court to enter judgment based on that opinion without the necessity of any further testimony (PA23a-32a). The Supreme Court's opinion, in its last paragraph, states that the matter is:

---

* The respondents being the possessors of houses on the various parcels of property in question, and having been referred to in the previous briefs and proceedings as the "householders" will be also referred to in this brief as the "householders."

> ". . . remanded to the trial court *with directions to enter judgment* in harmony with this opinion." (Emphasis supplied.) (PA32a)

This being the decision of that court, if Petitioner believed such a direction effected an unconstitutional deprivation of his property interests, he should have petitioned this Court from the first judgment of the Supreme Court of New Jersey, not from the present judgment. When the matter was remanded to the trial court to enter such judgment, the point that the trial court should take further evidence could have been raised, and petitioner's brief before this court so indicates, in fact, the federal question was not raised before the trial court, but was raised in the first instance in its brief on appeal from the trial court's determination (PB5). What petitioner had attempted to do through the appeal of *Hudson* and *Altomare* to the New Jersey Supreme Court was to limit the effect of the Supreme Court's first opinion, not to the ten parcels of property referred to in the Supreme Court's opinion, but to only one parcel. On the appeal from the trial court, the attorney for the homeowners made the point that if this petitioner wanted the first opinion of the Supreme Court restricted to only one property, he should have immediately applied for a rehearing before the Supreme Court, rather than take the circuitous route of waiting for remand to the trial court and then appealing from that judgment. Now the petitioner is engaged in the same basic tactic.

POINT III

There are no constitutional rights involved warranting the granting of a petition for a writ of *certiorari*.

The "constitutional question" asserted by the petitioner consists of an assertion that the original record before the trial court on remand is constitutionally deficient to sup-

port the factual conclusions implicit in the Supreme Court's original opinion. Most of that original record consisted of the colloquy of counsel, including many admissions and statements from which factual conclusions could be drawn. It is respectfully submitted that all petitioner's argument amounts to is that the record is insufficient to support such conclusions, a contention not significantly different from the contention ordinarily made that the jury's verdict is not supported by the evidence.

While it is conceivable that such a claim could rise to the level of a constitutional question, it is respectfully submitted that such is not the case here. The factual inferences and conclusions on which the householders based their argument before the New Jersey Supreme Court that a constructive trust should be imposed in their favor upon the property interest acquired by Hudson and Altomare are the same factual conclusions as to which this petitioner claimed there was insufficient factual support. The argument could have been made before the initial Supreme Court hearing that there was insufficiency of evidence to support the conclusion, and then that court would then have been faced with this issue. Respondent respectfully asserts that instead of a constitutional question, what is really being raised by petitioner before this court is a question of the sufficiency of the evidence to support factual conclusions. Furthermore, this question is being raised in a proceeding several times removed from the proceeding in which it should have been raised, and by a party who did not even appeal from the judgment of the trial court, which judgment is being sought to be reviewed.

These householders are still insecure in their possession as a result of this petition, and it is hoped that this Court, subject to the requirements of its own calendar, will end this insecurity quickly.

CONCLUSION

It is respectfully urged that for the reasons set forth, this Court should deny Petitioner's petition for a writ of *certiorari*.

Respectfully submitted,

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OCTOBER TERM 1965

No. 513

HERBERT HARVEY,

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vs.

JOHN LAWRENCE LYONS, *et als.,*

Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

This reply brief is to dispose of one question of substance, and several adjective considerations, raised by respondents in a Brief filed herein.

The Facts

Point III of respondents' reply brief says:

> The "constitutional question" asserted by the petitioner consists of an assertion that the original record before the trial court on remand is constitutionally deficient to support the factual conclusions implicit in the Supreme Court's original opinion. Most of that original record consisted of the colloquy of counsel, including many admissions and statements from which factual conclusions could be drawn. . . All petitioner's argument amounts to is that the record is insufficient to support such conclusions.

While this was not the constitutional question raised, petitioner will pay attention here to the argument of respondents that their statement of it is equivalent.

The original record referred to is the record of the hearing before the trial court in *Bron* vs. *Weintraub,* on June 11, 1962, three years before the Opinion which we seek to review. The issues before the court at that hearing are contained in the pre-trial order in that matter, and appear in the Certified Record annexed to the Petition herein (Su-

perior Court of New Jersey, Appellate Division—Appendix to Appellant's Brief, page 35a, line 12) as follows:

> legal title to the premises
> estoppel
> laches
> adverse possession
> res adjudicata
> right to mesne profits

Of these six issues, three (legal title, res adjudicata, right to mesne profits) were raised by Hudson, under whom petitioner claims; the other three (estoppel, laches, adverse possession) were raised by respondents. Essentially what the trial court was trying (and determined in favor of Hudson) were the questions of title and possession. The question of a trust ex maleficio was not before it.

Respondents correctly say in their Brief that the record of that hearing (1962) consisted almost entirely of colloquy of counsel. There was no evidence taken.* They here argue inferences from that colloquy as the source of the facts upon which a trust ex maleficio, though not pleaded, was later constructed (1964).

In *Humphrey* vs. *Eastlack*, 63 N. J. Eq. 136 (Chancery of New Jersey 1902) a plaintiff brought an action on certain grounds, which proved insufficient. He then reargued the matter on fresh grounds which he pieced together out of testimony introduced at the trial of the original issues. The court held that this was inadmissible; one cannot construct a new case out of materials culled from an old one, unless new pleadings give the adversary an opportunity to con-

---

* Except a single document read into the record by counsel, which is not pertinent to the issue. This lack of pertinence is not my opinion, but that of the Supreme Court of New Jersey (Opinion, Appendix to Petition herein, page 26a):

> The cause, however, was not tried on the theory of fraud, and since we are told there were further communications with the Weintraub heirs not spread on the record, we should not decide the case on that basis.

front the new issue.* This axiom is in point here. Even if evidence had been introduced at the 1962 trial tending to support a trust ex maleficio in favor of respondents, such evidence could only be used on pleading such a trust, and granting the legal owner accused of malefaction a hearing on the competence and bearing of the evidence upon the construction of the trust. In our matter, however, there is not even evidence. Petitioner and respondents agree that at the 1962 trial only a colloquy of counsel was recorded. In the absence of new pleading, whatever admissions might

---

* The syllabus reads (63 N. J. Eq. 136, 137):

> 2. A complainant who by his pleadings and issues joined thereon and proofs submitted in support of those issues, has presented certain and definite grounds for relief, cannot, after the case is closed, without suggestion of amendment, present by argument only, entirely different and new grounds for relief and have decree made to those grounds.

and the language of the court is (page 146):

> In presenting this cause on the argument the complainant's junior counsel has submitted an elaborate and ingenious brief in which he puts forward what is substantially a new and different case from that alleged in the bill. . .
>
> This, it must be observed, is a clear departure from the complaint to which the defendant was invited to respond, and seeks to argue the cause upon lines outside of the *allegata* and *probata*. This course of procedure has always been received with disfavor. Even clear proof of matters not alleged as ground for relief in the pleadings will not be noticed by the court. . . Where a party has presented his case by his bill and failed to sustain it by evidence, he cannot change his position and base his claim for relief on matters incidentally disclosed by the proofs. . . In *Midmer* vs. *Midmer*, the court of appeals unanimously refused, on an allegation of a trust arising between the parties by express agreement, and mentioning no other trust, to allow proof to be made of a resulting trust in another person.

In *Midmer* vs. *Midmer* cited above, 27 N. J. Eq. 548 (New Jersey Court of Errors and Appeals, 1876), the syllabus reads:

> 1. The bill in this case sought to establish a trust by virtue of an express agreement. The evidence was of a purely resulting trust in an entirely different person. . . *Held*, that the variance between the allegata and probata was fatal to relief.

The language of the court (page 549) is:

> The bill proceeds upon the ground of a trust arising . . . by virtue of an express agreement between the parties. . . There is not the slightest intimation in the bill of another trust in land. The very groundwork of the appellants' case upon the evidence, is a purely resulting trust in the mother of the parties to the alleged agreement, originating almost two years earlier than that stated in the bill. It is manifest that upon such a case, assuming it to be established, the appellants can have no relief upon the pleadings as they stand.

Under the present rules of practice in New Jersey, it is of course the court's pre-trial order which more particularly defines the issues being tried.

there have taken place are not competent* without a trial—by argument alone—to support a claim not then before the court, any more than evidence would have been, had there been evidence.

In order to get off the plane of abstraction, I shall examine one of the "facts" in question. In the colloquy of counsel to which respondents allude Herman Jaffee, of counsel for respondents, in the course of a discussion of the continuity of a chain of title, asserted:**

> Mr. Jaffee: These deeds were put on simultaneously. These corporations were all related, Harry Weintraub being secretary.
>
> Mr. Grimaldi [counsel for Hudson]: At the time of the foreclosure the owner was not joined in the proceedings.

An examination of the record shows that the deeds were not put on record simultaneously but a couple of years apart; and Harry Weintraub was not the secretary of any of the corporations. This falsehood was interpolated by Mr. Jaffee perhaps because that gentleman, besides representing the veterans who had been defrauded in this transaction, also represented the title company which had insured the mortgages made by the veterans in the aggregate sum

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* There exists a considerable body of doctrine, which it is not necessary to reproduce here, regarding the admissibility, at subsequent trials of the same issue and at trials of other matters, of admissions before a court. (*vide, e.g., Bowerman* vs. *Detroit Free Press*, 283 NW, 642, 644 [6-10]—Supreme Court of Michigan, 1939). Incidental remarks of counsel, or concessions made to expedite the trial at hand, are not so admissible. Only "solemn" admissions made, as it were, in the full light of day, are admissible, and then at subsequent trials, rather than subsequent arguments without trial, of different matters. The colloquy in our case discloses remarks by counsel which do not extend anywhere near the boundary where they would begin to qualify as proof. Inferences from such remarks have still less standing as proof than the remarks themselves. And there has been no showing of admissibility even of the tissue of inference available here, which is in any case too diaphanous to support the banner of public policy under which divestiture was made.

** Certified Record from Superior Court of New Jersey, Appellate Division, Appendix to Appellant's Brief, page 59a, lines 36ff.

of more than $100,000 (the veterans having paid down only a few hundred dollars each.) Both of his clients, the veterans and the title company, more especially the latter, stood to lose by the title error which Mr. Jaffee had passed*, and it was natural that he sought urgently to introduce some fiction into the case by which a flicker of life might be breathed, perhaps by artificial respiration, mouth to meretricious mouth, into the dead chain of title which his original client had insured on his certification. Mr. Grimaldi, counsel for Hudson, did not deny the false statement. There was no reason to deny it since it bore on no issue then before the court. There was no reason for Hudson's counsel to know one way or the other. Counsel therefore replied with the relevant consideration, and quite properly said nothing about Harry Weintraub's connection with this or that corporation. The statement appears in the transcript uncontradicted.

The Supreme Court of New Jersey took this as a relevant fact. In its Opinion setting up the trust ex maleficio, we read (Appendix to Petition herein, page 24a, second line):

> Harry Weintraub apparently was the secretary of both corporations.

One could run through the whole gamut of "facts" in this way. It would get in certain particulars to be a sophisticated discussion; and it is not pertinent. It is not the gravamen of the Petition to review putative *sequiturs* by which remarks made in colloquy might be dragged into the realm of inferred fact. In his Point III respondents' counsel suggests that it is, but the suggestion is misleading. The petition rests on the ground that the pertinent facts were not tried in the cause.

Petitioner respectfully calls attention to and enlarges the representation in his petition (though this representation is not part of the ground for review) that, in relation to

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* *Ibid.*, page 59a, line 21 and *passim*.

respondents, the facts are not in conformity with the statement upon which the court erected the trust ex maleficio; that the facts set forth in its Opinion are, as to respondents, substantially untrue; that the true facts, known in substance to petitioner, show that neither Hudson nor petitioner sought injury to respondents, and that any injury worked on them was procured by others. The facts are susceptible of proof in a court of law.

It is appropriate to notice here the question (briefly mentioned in the Petition) why petitioner did not seek review of the state court's Opinion in which the trust ex maleficio was originally constructed. Petitioner, like Hudson, sought no review of that opinion because he was content with it. The Opinion said in principle that one who oppresses another should be penalized by the construction of a trust in favor of the one oppressed. Petitioner has no quarrel with this view, nor, as he is informed, does Hudson. It would have been patently absurd to seek review by the Supreme Court of the United States of a doctrine (though of doubtful constitutionality) with which one is content. There survived an issue of fact. The Opinion covered two pieces of litigation, involving properties with different title histories. The issue of what facts applied to which properties was properly a question for the trial court. This is more especially true in this instance where, at the time the Opinion was handed down, not only did the Supreme Court of New Jersey evidently not know the answer to the pertinent questions, but neither did petitioner, nor Hudson. The facts had simply never been examined in any forum.

Investigation indicated to counsel that the facts did apply in part to certain of the householders, namely the Wansels and the Brons (here excluded.)

In trial court, to which the matter was remanded under the Opinion, and which was instructed to proceed in the matter "in accordance with its rules and practice" Hudson

objected to entry, on a mere motion to fix form of judgment, of blanket judgment against all the property in the absence of further proceedings to determine the facts as they applied to the several parcels; and counsel went so far as to object* on constitutional grounds to the entry of a judgment in the absence of such proceedings. That a judgment was nevertheless entered there, and subsequently affirmed by the highest court of the state, without any trial of the supposed facts, is the serious error in process which petitioner seeks to review.

Adjective Considerations

Respondents object to this petition on the formal grounds

a) petitioner was not among the parties who appealed the action below;

b) the question raised on this petition should have been raised earlier

i) before the state Supreme Court divested

ii) after the state Supreme Court divested and before the trial court entered judgment

iii) on petition for rehearing to the state Supreme Court.

a) It is true, as respondents assert, that petitioner was not formally on the appeal of the Amended Final Judgment, affirmance of which is here sought to be reviewed. That

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* Respondents' Brief (page 4) says he didn't, and inaccurately cites the Petition to that effect. The Petition (page 10) says that he did; and the certified record contains his language: "I object on constitutional grounds to entry of judgment" (Certified record from Superior Court of New Jersey, Appellate Division, Docket No. A-1172-63, Brief and Appendix of Defendants-Appellants, page 39a.) This was on motion to fix the form of judgment. Judgment had not been entered—it was under discussion. Petitioner, in his terminology, regards this not as a raising of the constitutional question but rather as an adversion to it. The question could not have been raised there, as respondents confusedly suggest it should, because no constitutional ground of appeal from the judgment could lie until after it was entered. Then it was raised (Petition, page 5).

appeal was by Hudson and Altomare from the "whole of the Amended Final Judgment" (except as to Bron.)* To that extent, the objection has merit. But respondents have no standing to raise it. In the trial court, judgment had originally been entered upholding the claims of Hudson, Altomare and petitioner. Respondents appealed, but only against Hudson and Altomare. No appeal was taken against petitioner.†

Notwithstanding there was no appeal against petitioner, the appellants there (the respondents here), upon prevailing in the state Supreme Court, procured judgment in trial court against petitioner as well as against Hudson and Altomare. This tactic by which respondents secured judgment against petitioner, even though no appeal had been taken against petitioner, bars the respondents from now objecting to the same recourse by petitioner against respondents. Respondents, as to the objection in point, raise it with unclean hands.

How these conflicting considerations will be viewed by this court is not for petitioner to say, though presumably the court will recognize the validity of petitioner's position. The question is in any case not pertinent to the matter before this court. Petitioner is the assignee of Hudson and Altomare.** Even if petitioner were barred on his own original claim, he would be competent to proceed on the assigned claims.††

Upon the petition being granted, the matter will go to the state court; and in that court the issue will be triable whether or not respondents have standing to raise the point.

---

* Appendix to Petition, page 43a.

† The language was similar. The appeal (Certified Record, Appendix to Appellants' Brief, page 87a) was from the "whole of the final judgment . . . in favor of Hudson Trading Corporation, a New Jersey Corporation, and Frank Altomare".

** Petition, page 5, footnote.

†† Respondents' brief expresses doubt of the validity of the assignments to petitioner. The assignments are in writing and will be produced by petitioner on request. Petitioner has written to the Clerk of this court for permission to file copies.

The only question it affects is whether petitioner can claim his original interest, along with Hudson's and Altomare's assigned claims, or the latter two only. No doubt the considerations adduced here will be conclusive in that court in favor of preserving petitioner's original claim along with the others. The point need not be resolved here.

b) Respondents contend petitioner should have raised his question earlier:

i) Respondents' suggestion that petitioner should have questioned the Opinion of the Supreme Court of New Jersey before the Opinion issued, refutes itself.

ii) Respondents suggest an earlier petition to this court. This point was dealt with in its narrative order above, page 6.

iii) Respondents suggest a rehearing should have been sought in the state court. Under the Rules in New Jersey, an appellant may move for a rehearing, which may be granted, though it is not a matter of right.* The issue to be determined was one of fact. The proper tribunal for determination of facts is the trial court, not the Supreme Court of New Jersey, which exercises primarily an appellate jurisdiction, being the court of last resort in appeals. No doubt, on its own initiative, that court may hear testimony if it chooses; but it would have been impertinent for petitioner to have moved the Supreme Court of New Jersey to try the facts in a matter in which it had just entered an Opinion.

There is therefore no merit in any of the adjective considerations raised by respondents, except the single techni-

* R.R. 1:9-4 (c).

cal point a) above, and this point, ungraciously raised in the posture respondents are in, is anyway without relevance to the question of whether the review here sought should be granted.

Counsel for respondents concludes his brief with a plea to this court to throw petitioner out hastily because the "householders are still insecure in their possession as a result of this petition." The householders' insecurity is not a result of this petition. It arises from the fact they have no title. What they have is a judgment of a court of competent jurisdiction granting a trust in their favor against the legal owner, issued, in the absence of a trial of the facts on which the trust was constructed, by caprice.

Petitioner is willing, and has been willing at all times, to assist the householders in solving their title problems without injury to them, other than the injuries brought about by their own actions, and the actions of "their" counsel, subsequent to the discovery of their predicament.

HERBERT HARVEY,
Pro se.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITION FOR REHEARING, AND MOTION.

SUMMARY.

The original ground of this petition was that petitioner had been deprived of property on an equitably constructed ground with facts invented in the Supreme Court of New Jersey without trial.

An additional ground is presented here: that in the action with which the instant action was consolidated in the New Jersey courts, an action to which petitioner was not a party and of which he cannot here seek review, he has also been divested by the New Jersey courts, establishing together with the instant action a practice in that state of denying process of law and constituting a present threat to legal order there.

The Motion, also presented here, requests permission of this court to introduce in detail the facts regarding the additional ground above asserted.

ARGUMENT.

In the matter of *Hudson Trading* vs. *Saulnier*, the action in New Jersey with which the instant action was consolidated, petitioner was divested by Amended Final Judgment of the trial court. Because of the consolidation of the two cases, this appears in the certified record before this court.* It also appears there that petitioner was not a party, either plaintiff or defendant, in that matter.** Thus petitioner was divested without process of law, even more flagrantly than in the instant matter.

Petitioner, subsequently to his petition herein, commenced an action in the state court † to have the Amended Final Judgment in question vacated against petitioner on the elementary ground that petitioner was not a party, and of want of due process. The matter has not yet been disposed of by the state court.†† It is being conducted in that court in a scandalous, corrupt and unscrupulous manner which gives the assurance that access to the process of that court will, regardless the form observed, be denied. No pretense of ethical legal behavior is being observed. Enormous oppression is being directed against me in the action.

We are here dealing with a practice, rather than an isolated case, of denial of due process in New Jersey.

The denial to one litigant of access to the courts, to due process of law (and by now to any process of law at all) is in effect its denial to all. Once the principle has been estab-

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* And in the Appendix to my Petition here, page 42a.

** Certified record from Supreme Court of New Jersey, Appellate Division (Docket No. A-103-62) Appendix to Appellants' Brief, page 21a.

† Superior Court of New Jersey, *Harvey* vs. *Saulnier et al.*, Docket No. L 973-65.

†† So that my remedies there have not yet been exhausted. I do not feel that this interferes with introducing the matter here. I am not here seeking review of *Saulnier*. I am citing it as part of a pattern of denial of process, which it is thus far; and as it progresses, it gets to be more and more so. If I waited for its ultimate disposition in the New Jersey courts, the twenty-five days allowed by your rules for filing this pleading would long have elapsed.

lished—when one person has been denied access to the courts for relief—it only remains to select those other persons who will be denied access in the same way. The end of this process is that the sovereign by its whim, and not by operation of law impartially, decides who can have property in New Jersey. Moreover, the process is not limited to property. In the second matter above referred to, there is a counterclaim in which my property, and also my liberty is attacked. I suppose the principle, once in use, can also be applied to life—if people can be divested by the whim of the sovereign, they can just as well be executed at the whim of the sovereign.

In the instant matter, what recourse exists except the Supreme Court of the United States? Any expectation for relief from the courts of New Jersey is by this time a laughable proposition. Counsel for my adversaries has been unscrupulous, mendacious and scandalous in inventing facts for the New Jersey courts to play with, but as everyone is aware, he enjoys total immunity from either civil or criminal recourse for any statement, however false, which he makes in court. Application to the bar association for discipline comes to mind here. But in this matter I am dealing, not with one of the leading, but the leading (in more ways than one) attorneys of the state. It is inconceivable that the bar association [it has been necessary to delete certain words in this passage because I have been informed they would be contemptuous] would do anything, except perhaps to penalize me from bringing the matter up. To refer a person in my position to the New Jersey Bar Association would be as cynical as to refer a Negro oppressed in Alabama to his available remedies before the Bar Association of that state.

The denial of due process affecting property, the subject of the petition here, is now followed by denial of process in a matter affecting property and liberty. The two matters are connected. One must expect, in the absence of review of the procedures by this court, only that this practice will

be extended, not restricted, in New Jersey, so that process of law ceases to be the rule in actual practice.

CONCLUSION.

I suppose this court is accustomed to wild exaggerations by counsel seeking to gain some point for a client. The contentions of this petition for rehearing may sound like exaggerations. I assure this court, in the soberest of tones, that I have said nothing but the truth. Wild allegations have been made by counsel, and have been adopted by the august court of whose decision review was sought in my petition, and still wilder allegations, in the comfortable shade of that decision, and of legal immunities conferred by law, are now being made in the second action. Like money, bad law tends to drive out good, and a jurisprudence will not be slow to respond to the clarion note of autarchy struck in such decisions. Already we are back to where the whim of the sovereign is unrestrained by law.

Once the courts forsake the law, it is inevitable that the law will be forsaken by the people. For anyone who takes his business, his career or his property seriously enough, the abdication of the law by the courts leaves him only one defense. What the courts will not defend he has to defend with such other forces as he can raise. The law of the gangster moves in where the law of the state moves out. As the language of this memorandum may suggest, I am not the type for it—I have other interests than business and property, and I am not going to go in with guns to defend what the law will not defend for me. But the refusal of the court of last resort to review a matter in which access has been blatantly refused in lower courts to even one litigant (be he the worst of scoundrels) starts a long process to work the beginning of which may be small but the end of which is the rule of force in the hands of extra-legal defenders of life and property—the imperium in imperio.

I don't know, but perhaps counsel are in the habit of wailing in this court about the collapse of legal process in

this or that state, and the court may be weary of exortations to defend the sanctity of law. If so, allow me to add that there are cases where the consideration is valid. I am not making this application to defend property. I care too little for the money value at stake in this litigation ever to have troubled this court, plagued as it is with the battling interests of a continent, to review my case. I am concerned, as every citizen should be concerned, and as every judge must be concerned, with the question whether I have access to the legal instrumentalities of the community in which I live. At present I do not. More, my very application for relief is bringing upon me heavy penalties in the courts to which I apply. The record is clear on these matters, although the record is not complete here. If nothing else, the injunction to brevity which I read in your rules of practice restrains me from setting forth the whole story in this pleading, as does a limitation to twenty-five days for preparation and printing. I append a motion to this petition for permission to disclose the rest of the story fully in this court.

No man is ever hung with a good opinion of the law, and it may be that a busy court will want to employ this generalization as dispositive. But it is precisely my opinion of the law which is here relevant, and that of any citizen whose legitimate concern is to know whether the law operates impartially for all. It may be that this court is indifferent to laymen's opinion of the law. But there exist millions who cannot be indifferent. Their concern must be with the quality of the law under which they live. No one, I nor any other reasonable man, can have a good opinion of a jurisprudence which denies access to any citizen. To secure such access is the whole reason for this petition. Eichmann got a fair trial, and that in Israel. I inquire whether I may have one in America.

MOTION FOR LEAVE TO FILE ADDITIONAL FACTS.

Petitioner respectfully moves for leave to present to this court the full facts in the matter of the deprivation of civil rights to petitioner in the New Jersey courts, and 45 days time after granting the motion in which to do so. The reasons for this Motion have been stated above.

Petitioner prays that this court grant rehearing of its Order of November 15, 1965 denying the Petition for Writ of Certiorari and that a Writ of Certiorari be granted to review the judgment of the Supreme Court of New Jersey in the above entitled case as pleaded for in the Petition docketed herein August 30, 1965. Motion is annexed as part hereof.

Respectfully submitted,

HERBERT HARVEY,
Attorney pro se.

CERTIFICATE.

I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

HERBERT HARVEY,
Petitioner.